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Ex Parte

June 27, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W. – Portals
Washington, DC 20554

Application by Verizon New York Inc. for Authorization To Provide In-Region, InterLATA Services in State of Connecticut, Docket No. 01-100; Application of Ameritech and SBC Communications For Consent to Transfer Control, CC Docket No. 98-141and 98-184; Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98

Dear Ms. Magalie,

At the request of Ms. Dorothy Attwood, Chief of the Common Carrier Bureau, we are providing the attached paper in the above proceedings. The twenty page limit associated with CC Docket No. 01-100 does not apply.

Please feel free to contact me with any questions.

Sincerely,

Dee May

Attachment

cc: D. Attwood
K. Farroba
C. Libertelli
M. Carey
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G. Reynolds
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S. Pie

The following question has arisen in the wake of the D.C. Circuit's decision in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*ASCENT*"): Does anything in that decision alter the preexisting rule that an ILEC has no obligation to provide line-sharing services to other carriers (including its own advanced services affiliate), and no obligation to provide its own xDSL services at retail or wholesale, in circumstances where it does not provide voice services to end users? The answer is no.

I. The 1996 Act And FCC Orders Confirm That An ILEC Has No Obligation To Provide Line-Sharing Services Or xDSL Services Where It Does Not Provide Voice Services To End Users

a. The Telecommunications Act of 1996 requires an ILEC (and any successor or assign) to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail" to end users (*i.e.*, "subscribers who are not telecommunications carriers"). 47 U.S.C. § 251(c)(4)(A). The issue here concerns the resale obligations of ILECs, such as Verizon, and their advanced services affiliates, such as Verizon Advanced Data Inc. ("VADI"). VADI offers xDSL services to end users by purchasing the same line-sharing service from Verizon as other xDSL providers. Like a number of other ILECs, Verizon makes its line-sharing service available *only* where it provides retail voice services for particular end users. Where Verizon does not provide those voice services, its line-sharing service is unavailable, and VADI cannot and does not provide xDSL services, either at retail or for resale.

That arrangement is entirely consistent both with section 251(c)(4) itself and with the Commission's own rulings on the scope of an ILEC's line-sharing obligations. First, section 251(c)(4) limits an ILEC's resale obligations to services that the carrier in fact

"provides" to end users. VADI does not and (as discussed below) cannot "provide" xDSL services to end users for whom a CLEC is the voice carrier, because Verizon offers line-sharing services to VADI and other data carriers only where it remains the voice provider for the relevant end users.

The Commission's orders make abundantly clear that Verizon and other ILECs are *entitled* to place that limitation on their line-sharing services. First, in the 1999 *Line Sharing Order* itself, the Commission exempted any ILEC from the obligation to provide line-sharing services where a CLEC has replaced the ILEC as an end user's voice provider. Third Report and Order and Fourth Report and Order, *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999), at ¶ 72. The Commission explained that, "in the event that the customer terminates its incumbent LEC provided voice service, for whatever reason, the competitive data LEC is required to purchase the full stand-alone loop network element if it wishes to continue providing xDSL service." *Id.* That determination is controlling here: once an end user has terminated voice service with the ILEC "for whatever reason," the ILEC is relieved of any line-sharing obligation whatsoever.

The Commission's *Texas 271 Order* both reaffirms that conclusion and takes it one step further, clarifying that an ILEC may sever an end-user's xDSL service once the ILEC loses that end user as a retail customer of its voice services. In that proceeding, AT&T had complained that "when a SWBT customer who had been using SWBT's local voice service and xDSL service combined over a single copper loop chose to switch voice service to AT&T, SWBT informed the customer that its xDSL service would be disconnected unless the customer switched voice service back to SWBT." Mem. Opinion

and Order, *Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 (2000), at ¶ 330 n.917. Specifically, AT&T had claimed that SWBT's practice of not providing its xDSL service to customers who received voice service from another carrier was unreasonable, and amounted to the equivalent of an "unreasonable restriction on resale." *See* Comments of AT&T Corp. in Opposition, CC Docket 00-4 (filed Jan. 31, 2000). The FCC disagreed, however. Citing the *Line-Sharing Order*, the Commission found that, in disconnecting the customer's xDSL service, SWBT had acted well within its rights under the 1996 Act, because nothing in the Commission's orders "obligate[s] incumbent LECs to provide xDSL service under the circumstances AT&T describes." *Id.* at ¶ 330.

The Commission reaffirmed each of these conclusions in its recent *Line Splitting Order*. *See* Third Report and Order on Reconsideration in CC Dkt No. 98-147, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC No. 01-26 (Jan. 19, 2001). There the Commission required ILECs "to permit competing carriers to engage in line splitting using the UNE-platform where the competing carrier *purchases the entire loop* [as a UNE] and provides its own splitter." *Id.*, at ¶ 19 (emphasis added). But it confirmed, once more, that an ILEC is obligated to provide line-sharing services *only* where it "provide[s] voice service to an end user." *Id.*, at ¶ 17. And, as in the *Texas 271 Order*, the Commission determined that nothing in its prior orders requires ILECs "to provide xDSL service when they are no[] longer the voice provider" for particular end users. *Id.*, at ¶ 26.

b. In sum, both the statutory language and the Commission's consistent orders on this subject are unambiguous in preserving both an ILEC's right to condition the provision of line-sharing services on the ILEC's retention of those end users as retail voice customers. Moreover, the Commission's position on that issue makes abundant policy sense whether the relevant CLEC voice provider serves the end user through network elements or through resale. As the Commission observed in the *Line Sharing Order*, "the complexities involved with implementing line sharing dramatically increase where more than two service providers share a single loop." *Line Sharing Order,* at ¶ 74. Requiring an ILEC to provide line-sharing when a reseller provides the voice service would place at least three carriers -- the reseller, the ILEC, and the data carrier (including any advanced services affiliate) -- all on a single line. Any such requirement would raise the same types of profound operational issues that the industry has only recently begun to confront in the context of ILEC-facilitated line splitting (and that the Commission itself recognized may take some significant amount of time to resolve through industry collaborative efforts).

In the ordinary line-sharing context, the ILEC maintains a retail business relationship with the end user; on resold lines, by contrast, that relationship would be severed, and the ILEC would serve as a wholesale provider to both the reseller or resellers and the xDSL provider. That three-carrier (and in some cases four-carrier) sharing arrangement would confront the industry with such operationally complex questions as these:

- What business and OSS relationships need to be established between the reseller and the data carrier to coordinate service with the end user customer and the ILEC?
- What carrier is entitled to access the end user's customer records, how does that change if there are two different resellers providing voice and data respectively, and who pre-qualifies the line?
- Under what circumstances can the data carrier place an order with the ILEC to add xDSL service to a line where the voice service is provided by a reseller?
- Which carrier would have primary responsibility for coordinating end user trouble reports (related to voice and/or data) and other maintenance problems that affect the common loop facility?
- How does this change if there are two different resellers providing voice and data service respectively over a line?
- How would end user and carrier requests for service changes that affect the loop facility be handled, and which carrier would be responsible for coordinating the change?
- How should disconnection of an end user's resale voice service affect the data provider's data service?

Reconciling the individual business agendas and relationships among these multiple carriers can not take place in a vacuum and would require a collaborative industry effort to define the precise nature of the business relationships among the various carriers on the line. Once those business relationships are defined, Verizon would have to undertake a

dramatic and very costly revision of the methods and procedures currently deployed for ILEC-based line sharing.

More generally, in designing those existing methods and procedures, ILECs throughout the United States have relied extensively on the Commission's current position that an ILEC has no obligation to provide line-sharing where it is not an end user's voice provider. A policy reversal by the Commission on that issue now, quite apart from questions about its legal merits, would require ILECs to invest tens of millions of dollars (and perhaps more) to reconfigure their operations to meet these sudden new obligations. That is reason enough for the FCC to stand by its previous, and entirely correct, position.

II. The *ASCENT* Decision Has No Bearing On The Line-Sharing And Resale Obligations At Issue Here.

The *Line Sharing Order*, the *Texas 271 Order*, and the *Line Splitting Order* confirm that an ILEC as such has neither a line-sharing obligation nor an obligation to provide its own xDSL service where it loses an end user as a voice customer; in none of those orders did the Commission's treatment of the relevant issues turn on whether the ILEC had created a separate affiliate to provide advanced services to the ILEC's end users (even though the ILEC at issue in the *Texas 271 Order* had in fact created such an affiliate). For that reason and others, the D.C. Circuit's recent decision in *ASCENT* leaves the Commission's position on these issues wholly undisturbed.

ASCENT holds that an ILEC's advanced services affiliate, if it qualifies as a successor or assign of an ILEC, is subject to the normal obligations that apply to an ILEC under section 251(c). *See ASCENT*, 235 F.3d at 666-68. *ASCENT* does not subject such an affiliate, much less the ILEC itself, to obligations *beyond* those that are applicable to

ILECs that themselves provide advanced services without creating a separate affiliate. Put another way, after *ASCENT*, the use of a separate advanced services affiliate may provide fewer regulatory benefits to an ILEC, but it obviously does not *enlarge* the set of substantive regulatory burdens under section 251(c). Thus, because an ILEC that *itself* provides xDSL services need not provide either line-sharing or its own xDSL service where it is no longer the voice provider, the creation of a separate affiliate to provide xDSL services does not suddenly obligate the ILEC (or its corporate family) to provide line-sharing in those same circumstances.

Of course, in this case, that conclusion is only reinforced by (but not dependent upon) the technical limitations and regulatory requirements that VADI labors under as a separate affiliate. Here, VADI is "the carrier" that provides xDSL services; because it is deemed to be a "successor or assign" of an ILEC, therefore, VADI itself is treated as an ILEC (*see* 252(h)(1)(B)(ii)) and must make the services that *it* provides available for resale to the same extent as any other incumbent. And here, VADI does not (and cannot) provide service where another carrier provides voice service on the line. Consequently, there is no service to resell.

Indeed, that conclusion, at least with respect to Verizon, follows *a fortiori* from the reasoning of the *Line Sharing*, *Line Splitting*, and *Texas 271 Orders*. On their face, those *Orders* confirm that, under the FCC's existing rules, once an end user chooses a CLEC as its voice provider, an ILEC is generally free to disconnect that end user's xDSL service even when it *could* continue providing that service. *See, e.g., Texas 271 Order,* at ¶ 330 n.917; *Line Splitting Order*, at ¶ 26. Here, in contrast, Verizon does not offer xDSL services at all, and VADI *cannot* obtain line-sharing, and therefore cannot provide

xDSL services, where another carrier is the voice provider, because Verizon follows the voice-carrier limitation endorsed in the *Line-Sharing Order*. Moreover, the Bell Atlantic/GTE Merger Conditions affirmatively limit VADI to obtaining from Verizon only those line-sharing services that also are available to other CLECs. *See* Mem. Op. And Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control*, 15 FCC Rcd 14032, App. D ¶ 4(f) (2000) (Verizon must "permit unaffiliated telecommunications carriers to order such facilities and services under the same rates, terms, and conditions, and to utilize the same interfaces, processes, and procedures as are made available to the separate Advanced Services affiliate"). Here, Verizon's line-sharing services are not available to *any* carrier in circumstances where Verizon is not the voice provider, and the Merger Conditions' nondiscrimination requirement plainly does not permit an exception to be made for VADI alone.

Finally, for several independent reasons, it is inconsequential that in other contexts the Commission has found that section 251(c)(4) "requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings." *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499 (1996), at ¶ 877. *First*, Verizon and VADI do not in fact bundle voice and xDSL services for their end users. The Commission has consistently defined "bundling as the offering of two or more products or services at a single price, typically less than the sum of the separate prices." *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules, etc.*, CC Docket Nos. 96-61 and 98-183, & 15 (rel. Mar. 30, 2001). The Commission also has explained that bundling "is

different from 'one-stop' shopping arrangements in which customers may purchase the components of a bundle, priced separately, from a single supplier." *Id.* Here, however, the voice services and DSL services are offered, ordered and priced separately, and the obligation to provide the separate components of "bundled service offerings" is thus wholly inapposite. *Second*, that obligation is particularly irrelevant here given the Commission's repeated and highly specific determinations that ILECs may deny line-sharing to CLECs -- and may generally disconnect an end user's xDSL services altogether -- where the ILEC loses the end user as a retail voice customer. *Finally*, it would be especially inappropriate to apply that obligation where, as here, compliance would place an ILEC or its affiliate in direct violation of an independent legal prohibition imposed by the Commission itself.